IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 20TH SEPTEMBER 2007 / 29TH BHADRA 1929

SA.No. 422 of 1998(A)

AS.106/1978 & 110/1978 of PRINCIPAL SUB COURT,ALAPPUZHA
OS.289/1962 of MUNSIFF COURT, THIRUVALLA

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APPELLANTS/RESPONDENTS 3 & 5 TO 8 IN AS NO.106/1978/APPELLANTS IN AS NO.110/1978/DEFENDANTS 4 & 6 TO 9 IN SUIT:

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1. NARAYANI AMMA BHAVANI AMMA,
PADMAVILASATHU HOUSE, MADAPPALLY MURI,
THRIKKODITHANAM VILLAGE.

2. PARAMESWARA PANICKER UNNIKRISHNAN NAIR IN -DO- -DO-

3. BHAVANI AMMA PADMAKUMARI AMMA, IN -DO- -DO-

4. PARAMESWARA PANICKER MADHULAL, LATE A MINOR,
NOW A MAJOR, RESIDING IN -DO- -DO-

5. PARAMESWARA PANICKER HARILAL, LATE A MINOR, NOW A MAJOR,
RESIDING IN -DO- -DO-

BY ADV. SRI.S.V.BALAKRISHNA IYER
SHRI P.B.KRISHNAN

RESPONDENTS/APPELLANTS 3 TO 13 & RESPONDENTS 2 & 4 IN AS NO.106 / 1978/RESPONDENTS 3 TO 13 IN AS NO.110/1978/PLAINTIFF NO.3 & LRS OF PLAINTIFF NO.2 & LRS OF DEFENDANT NO.2(RESPONDENT NO.1 IN AS NO.106/1978) IN SUIT:

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1. PADMANABHA PILLAI MADHAVAN PILLAI, KANNATHU
VEETTIL, PAIPPAD MURI, THRIKKODITHANAM VILLAGE.

2. K.M.MADHAVA PANICKER, S/O.KOCHU PENNAMMA THANKAMMA,
MARUKAPALLIL HOUSE, ANIKAD P.O., PALLIKATHODU, KOTTAYAM
686 503.

3. K.M.RADHAKRISHNA PANICKER, S/O.-DO-, MUNDAKAL VEEDU,
NEERATTUPURAM P.O., THIRUVALLA.

4. K.M.SREEDEVI AMMA, D/O.-DO-, KRISHNAVILASOM, THUMBAMON P.O.
PANDALAM.

5. K.M.RAMACHANDRA PANICKER, S/O.-DO-, RESIDING AT RAMAMANGALAM, PERUNNA P.O., CHANGANACHERRY.

6. K.M.GOPALAKRISHNA PANICKER, SON OF -DO-, CLERK, DMO OFFICE, KOTTYAM, RESIDING AT MADHAVA SADANAM, KARIMUTTOM, MADAPPALLY, THRIKODITHANAM VILLAGE, AMARA P.O., CHANGANACHERRY.

7. K.M.LEELADEVI, D/O.-DO-, ARYAT VEEDU, AKAMKODI P.O., HARIPAD.

8. K.M.VASUDEVA PANICKER, S/O.-DO-, SROICHITRA ART GALLERY, MUSEUM AND ZOO P.O., THIRUVANANTHAPURAM.

9. K.M.RAMADEVI AMMA, D/O.-DO-, RAM NIVAS, AMARA P.O.,MADAPPALLY CHANGANACHERRY.

10. K.M.UMADEVI AMMA, D/O.-DO-, TYPE 111/4 ZINC SUSELTON, UDAIPUR, RAJASTAN, PIN 313 024.

11. K.M.UNNIKRISHNA PANICKER, S/O.-DO- MADHAVA SADANAM, AMARA P.O., MADAPPALLY, CHANGANACHERRY.

12. PARAMESWARA PANICKER GOPALAKRISHNAN NAIR, PUTHUPPARAMBIL, KANNADI MURI, CHANNAMKARI VILLAGE, KUTTANADU TALUK.

13. SANTHAKUMARI AMMA, PUTHUPARAMBIL, KANNADI MURI, CHENNAMKARY VILLAGE.

R5 BY ADV. SHRI K.G.NARAYANAN NAIR
R1, R3, R6 - R11 BY ADV. SRI.P.GOPAKUMARAN NAIR
SRI.C.S.DIAS

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 20/09/2007, ALONG WITH LAA NO. 240 OF 1990 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR ,J.

L.A.A.No.240 of 1990

&

S.A.No.422 of 1998

Dated, this the 20th day of September, 2007

JUDGMENT

Respondents 3 and 5 to 8 in A.S.No.106/1978 who are the appellants in A.S.No.110/1978 are the appellants in the Second Appeal. They were defendants 4 and 6 to 8 in the suit. Second Appeal arises from a decree and judgment passed by the Munsiff's Court, Thiruvalla in O.S.No.289/1962 which was modified by judgment dated 29.10.1997 in A.S.Nos.106/1978 and 110/1978. The facts of the case reveal that it was a fight between father and son. First plaintiff was the father of the deceased first defendant and second plaintiff. Third plaintiff was the husband of the second plaintiff. Plaintiffs 1 to 3 filed the suit for a declaration of title of first plaintiff over item Nos.1 and 3 in A schedule property and title of plaintiffs 2 and 3 over item Nos.2 and 4 in A schedule property and also for recovery of item Nos.1 and 3 to the first plaintiff and item Nos.2 and 4 to the second and third plaintiffs. In the plaint it was averred that the suit properties having an extent of 2 acres originally belonged to Vettinjayathil Tharawad. First plaintiff purchased the same from Unnooli Amma Narayani Amma and others on 19.9.1109 as per Ext.P5 sale deed. 34 cents were surrendered for formation of a road. First plaintiff constructed two buildings, item Nos.2 and 4 in one acre and 66 cents of land and the entire properties absolutely belonged to the first plaintiff.

On 4.8.1962 first plaintiff sold item No.1 having an extent of 30 cents along with item No.3 building to the deceased first defendant and item No.2 along with item No.4 building to plaintiffs 2 and 3. It was averred that possession of 30 cents was handed over to deceased first defendant and the remaining properties to plaintiffs 2 and 3. The entire properties were cultivated with tapioca and the vendees had agreed that first plaintiff can take the yield. On 11.8.1962 deceased first defendant trespassed into item No.4 building and permitted a person who was conducting tea shop in item No.2 to shift his tea shop to item No.4 building. It was also averred that deceased first defendant illegally plucked the tapioca cultivated by the first plaintiff in the property. It was further averred that Ext.P1 lease deed was executed by one Narayana Panicker Velayudha Panicker of Vettinjayathil Tharawad on 29.5.1100 for an area of one acre and 14 cents in favour of Vinasanthi Ouseph and Kochukunhu Pillai. He had no authority to execute a lease. The lessees were not put in possession of the property and the same remained with the jenmi family. It was further averred that there was a partition in the year 1105 and these properties were allotted to Unnooli Amma Narayani Amma and others and from them first plaintiff had purchased the same. It was averred that on the date of purchase first plaintiff was put in possession of properties purchased. It was averred that lessees under Ext.P1 assigned one acre of the property in favour of Kuruvila Devassia excluding 14 cents and the

transferee assigned a portion of the same under Ext.P3 dated 13.2.1112 in favour of first defendant and the rest of the property under Ext.P4 dated 25.5.1120. The first plaintiff got 14 cents of lease hold properties in his name under Ext.P6. According to the plaintiffs the assignments were executed by Kuruvila Devassia in favour of deceased first defendant for and on behalf of the first plaintiff and first defendant did not get any right or possession. That was a benami transaction entered into for the benefit of the first plaintiff. It was contended that deceased first defendant did not get any right or possession over the property under Exts.P3 and P4 and hence first plaintiff was entitled to recover item Nos.1 and 3 in A schedule property and plaintiffs 2 and 3 are entitled to recover item Nos.2 and 4 in A schedule property.

2. Suit was resisted by the deceased first defendant. He filed written statement contending that the first plaintiff did not get any right or possession over the property. It was specifically contended that executants of Ext.P5 sale deed dated 19.9.1109 had no right or possession over item Nos.1 and 2. The allegation that first plaintiff constructed item Nos. 3 and 4 buildings was also denied. It was contended that the property which was lying within the boundaries mentioned in the plaint originally belonged to Sankara Panicker Velayudha Panicker of Vettinjayathil Poothamkuzhiyil House. It was contended that he executed a lease deed in favour of Vinasanthi Ouseph and Narayana Pillai Kochukunju Pillai and

lessees were put in possession. It was further contended that 14 cents of property which lies north-south was enjoyed by Kochukunju Pillai and the remaining portion of the lease hold property was assigned to Kuruvila Devassia and Kuruvila Devassia was in possession and enjoyment of the property. It was averred that first defendant got assignment of 20 cents of property from Kuruvila Devassia on 13.2.1112 and put up item No.4 building in that property. It was averred that he was conducting a shop in item No.4. It was averred that Kuruvila Devassia was residing in the rest of the property and on 25.5.1120 the remaining portion of the lease hold property was also assigned by Kuruvila Devassia in favour of the first defendant. The averment that the first plaintiff took assignment of the lease hold properties in the name of first defendant as a benamidar was denied. It was contended that the sale deed alleged to have been executed by the first plaintiff in favour of first defendant was fabricated for the purpose of defeating the right of the first defendant. The averment that item Nos.1 and 3 were sold to first defendant and items 2 and 4 were sold to plaintiffs 2 and 3 was denied. It was contended that the properties included within the boundaries mentioned and described in the plaint excluding the 14 cents on the western side which lies north-south was in the absolute possession and enjoyment of the first defendant. It was contended that no other person has got any right or possession over that properties. The allegation that first plaintiff effected tapioca cultivation was

denied. The allegation that there was an understanding to allow the first plaintiff to take yield was also denied. Trespass alleged was also denied. It was contended that at the instigation of first plaintiff the children of plaintiffs 2 and 3 made an attempt to trespass into item No.4. It was contended that Vettinjayathil Sankara Panicker Velayudha Panicker had absolute right over the property described in the plaint. The contention that the first plaintiff got possession of the property under Ext.P5 sale deed on 19.9.1109 was denied. The averment that first plaintiff put up item No.4 building was also denied. First defendant was entitled to get fixity of tenure over the suit properties. It was also contended that the assignment deeds were in the possession of first defendant and some time prior to the date of filing of the suit first plaintiff came to his house and took away those documents in his absence. So he prayed for dismissal of the suit.

3. Trial court raised as many as 11 issues. After trial the trial court dismissed the suit as per judgment dated 23.12.1965. Challenging that decree and judgment the plaintiffs filed A.S.No.133/1966. That appeal was also dismissed. After the disposal of A.S.133/1966 the first defendant died and his legal representatives were impleaded. Challenging the decrees passed by the trial court as well as first appellate court plaintiffs filed S.A.No.69/1972. The Second Appeal was disposed of on 3.4.1975. Thereafter the plaintiffs filed R.P.No.64/1975 for review and one sentence in the operative portion of the judgment was substituted.

After confirming the findings of the court below on issues 1 to 11 this Court remanded the suit. The additional defendants filed an additional written statement adopting the contentions raised by the deceased first defendant. It was contended that one acre and 66 cents of land which lies within the boundaries described in the plaint excluding 14 cents of property on the west which lies north-south was in the possession of the deceased first defendant under the lease deeds and after his death the additional defendants are in possession. It was contended that the plaintiffs are not entitled to get recovery of any portion of that property. After remand a commissioner was deputed who filed Ext.C1 report and Ext.C2 plan. Trial court allowed the plaintiff to recover BCHG plot from the defendant as shown in Ext.C2 plan. Both sides filed appeals. Plaintiffs filed A.S.No.106/1978 and the additional defendants 4 and 6 to 9 filed A.S.No.110/1978. Lower appellate court allowed both the appeals, set aside the decree and judgment passed by the trial court and remanded the matter for fresh disposal. Challenging the order of remand plaintiffs filed C.M.A.No.52/1982 before this Court. This Court set aside the order of remand and directed the lower appellate court to dispose of the appeal on its merits. Thereafter additional defendants filed I.A.No.1746/1980 for amending the written statement. That petition was dismissed by the lower appellate court. Challenging that order additional defendants filed C.R.P.NO.939/1982 before this Court. This Court dismissed the Civil Revision

Petition. While dismissing the Civil Revision Petition it was observed that the amendment sought was based on a contention that the old Limitation Act would apply or not and that contention is a pure question of law which would be argued before the lower appellate court where the appeal was pending. Thereafter the lower appellate court heard both the appeals together and the appeal filed by the additional defendants was dismissed and the appeal filed by the plaintiffs was allowed. Plaintiffs were allowed to recover EHJI plot also from the defendants by giving compensation for the buildings put up by the defendants which were to be determined by the execution court. Challenging that judgment and decree this Second Appeal is filed.

4. In the appeal memorandum the appellants had raised the following substantial questions of law:

(A) Are not the judgment and decree of the lower appellate court contrary to the orders of remand in S.A.No.69 of 1972 and C.M.A.No.52 of 1982 both on the file of this Hon'ble Court and are not the lower appellate court judgment and decree liable to be set aside for that sole reason?

(B) In the light of the orders of remand passed by this Hon'ble Court, can the plaintiffs be granted any decree for recovery of land in excess of 66 cents including 14 cents covered by Ext.P6?

(C) Is the decision of the lower appellate court sustainable in law for its

clear failure to decide the defence of the appellants for the claim for recovery of the extent of 66 cents?

(D) Whether on the facts and in the circumstances of the case, have the plaintiffs established their subsisting title so as to entitle them to recover possession?

(E) Is it not the burden of the plaintiffs to prove possession or a discontinuation thereof within a period of 12 years preceding the suit in order to entitle them to recover possession?

(F) Would not the suit, governed as it is by Article 142 of the Limitation Act, 1908, suffer a dismissal, on the plaintiffs' failure to prove possession within 12 years of the suit?

(G) Is there any identification of the 66 cents including the 14 cents covered by Ext.P6 permitted to be recovered, subject to the appellants' defence, as mandated by the judgment in C.M.A.No.52 of 1982 in order to grant a decree in favour of the plaintiffs?

(H) Is the identification of the plots taken in by Ext.P1, P2, P3, P4 and P6 correct and sustainable?

(I) Is the location of plaint items 3 and 4 as now found correct?

(J) Are the plaintiffs entitled to recover any extent of property out of the 66 cents permitted to be recovered?

This Court admitted the appeal and issued notice. In the meanwhile a portion of the disputed property was acquired for the purpose of formation of a market. There was dispute regarding the apportionment of compensation. There was also a claim for enhancement of compensation. The Land Acquisition Officer referred the matter to Subordinate Judge's Court for deciding the disputes Land Acquisition Court in view of the judgment of the lower appellate court found that the plaintiffs are entitled to get compensation. Challenging that judgment the defendants had filed L.A.A.No.240/1990 before this Court. Both the appeals are heard together.

5. Learned counsel appearing for the appellants has argued that the trial court as well as the lower appellate court proceeded on the assumption that the right of the plaintiffs to recover the properties was found by this Court and the matter was remanded for the limited purpose of identifying and delivering that property. It is argued that the suit was for recovery based on title while the provisions of old Limitation Act was in force and all the three courts including this Court concurrently found that the plaintiffs are not entitled to get the relief of recovery. Since the plaintiffs raised a contention that defendants had not raised any claim over 66 cents of property this Court directed the trial court to consider whether the plaintiffs are entitled to get recovery of that 66 cents alone. It is argued that there is no finding in the S.A. or in the C.M.Appeal to the effect that

plaintiffs are entitled to get recovery of 66 cents. It is argued that the trial court as well as the first appellate court proceeded on the wrong assumption that the remand was to locate 66 cents to be recovered. It is argued that the specific contention raised by the deceased first defendant and his legal representatives is that the entire properties lying within the boundaries stated in the plaint is in the possession of the defendants as lessees and the plaintiffs are not entitled to get recovery of any portion of that property. It is argued that the plaintiffs have no case in the plaint that any surplus portion is available in exclusion of the properties covered by Exts.P3 and P4. It is argued that the trial court ought to have raised an additional issue as to whether the plaintiffs have any right to recover any portion of the suit properties and if so which is that properties. It is argued that the trial court as well as the lower appellate court did not discuss any of the contentions but straight away allowed recovery of a plot which even trial court found not properly located. It is also argued that there was violation of the directions of the judgment in C.M.A. and also C.R.P. and on that sole ground alone the judgments and decrees passed by the courts below are to be set aside.

6. Learned counsel appearing for the respondents has argued that challenging the decree and judgment passed by the trial court dismissing the suit the plaintiffs filed A.S.No.133/1966 and in that appeal the plaintiffs had raised a contention that the deceased first defendant can have right and possession over

only one acre of property and his claim was as a tenant and he had no other claim over the property. It is argued that the lower appellate court accepted the contention of the plaintiffs that even accepting the entire case put forward by the defendant, plaintiffs are entitled to recover the remaining extent of the property. It is argued that the lower appellate court found the right of the plaintiffs to recover any land in excess of one acre of land in the possession of defendant covered by lease deed. But instead of granting the relief of recovery of that plot the lower appellate court directed the plaintiffs to file a fresh suit. In the Second Appeal filed by the plaintiffs this Court found that that was not necessary and remanded the case to identify the 66 cents of land and to pass a decree for recovery. It is argued that the defendants did not file any appeal or cross-appeal against the finding of the lower appellate court in A.S.No.133/1966 and as such they were estopped from contending that the plaintiffs have no title over the remaining portion of the property. It is argued that though a contention was raised that the plan prepared was not correct no attempt was made by the defendants to substantiate that contention and considering the fact this is a litigation started almost half a century back it has to be given a finality. It is argued that the defendants are not entitled to resist the recovery and even assuming that they are entitled to raise a contention under Articles 142 and 144 of the old Limitation Act that will not help them in any way.

7. Learned counsel appearing for the appellants/defendants has argued that since the suit was wholly dismissed by the trial court as well as lower appellate court, any observation made by the courts below will not operate as res judicata and the defendants have no legal obligation to file any appeal or corss-appeal. Further it is argued that this Court in Second Appeal confirmed the findings of the trial court and remanded the matter to consider whether the prayer for recovery of 66 cents made by the plaintiffs is allowable or not and as such the courts below are bound to consider the entitlement of the plaintiffs to get recovery of any part of the plaint schedule property.

8. As I have already stated the dispute was between father and son. Properties originally belonged to Vettinjayathil Tharawad. There was a partition among the members of the tharawad as evidenced by Ext.P7 dated 3.7.1105. As per that partition deed the suit properties and other properties were allotted to Unnooli Amma Narayani Amma and others. They sold the jenm right over the property to first plaintiff under Ext.P5 sale deed dated 19.9.1109. According to the first plaintiff he got possession of the entire property described in the sale deed. But he had admitted that one Narayana Panicker Velayudha Panicker of Vettinjayathil tharawad had executed a lease deed in favour of Vinasandhi Ouseph and Kochukunju Pillai as per Ext.P1 dated 29.5.1100. It was also admitted by him that the original lessees assigned the lease hold in favour of Kuruvila Devassia

excluding 14 cents under Ext.P2 dated 29.4.1102. The 14 cents excluded was taken assignment by the first plaintiff under Ext.P6. His further case was that he took assignment of 20 cents under Ext.P3 dated 13.2.1112 and 90 cents under Ext.P4 dated 25.5.1120 in the name of deceased first defendant. The definite stand taken by the first plaintiff was that the first defendant was a benamidar for him. His further case was that he executed a sale deed for 30 cents of property in favour of deceased first defendant and another sale deed for one acre and 36 cents of property in favour of plaintiffs 2 and 3. Contesting first defendant raised a specific contention that the lessor under Ext.P1 was competent to execute lease and that lease had taken effect and the lessee had assigned his right in favour of Kuruvila Devassia and it was he who took Exts.P3 and P4 assignment of lease spending his own money and he was not a benamidar for the first plaintiff. This contention was accepted by the trial court as well as first appellate court and also by this Court. The trial court dismissed the suit. Plaintiffs filed A.S.No.133/1966. First appellate court confirmed the finding that Ext.P1 was followed by possession and first defendant was in possession of properties under Exts.P3 and P4. Lower appellate court found that regarding item No.1 and buildings out of plaint schedule property the first defendant was in possession as lessee and under the provisions of Act 1 of 1964 the defendant cannot be evicted since he was entitled to fixity of tenure. At that stage the plaintiffs put forward a case that even accepting the case

of the first defendant in toto his claim was limited to one acre alone and plaintiffs were entitled to get a decree for recovery of balance area of 66 cents out of plaint schedule property which was not claimed by the first defendant. Lower appellate court found that the area included in Ext.P3 is 20 cents and area included in Ext.P4 is 90 cents. But it was found that Kuruvila Devasia under Ext.P2 got possession of only one acre and he assigned claim over one acre under Exts.P3 and P4 in favour first defendant. Therefore the first defendant will get lease hold right over one acre. It was further found that there was a balance of 66 cents over which the the first defendant had no valid claim for title or possession. But the lower appellate court found that no relief can be granted in the suit. It was found as follows:

> ".....But at the same time the plffs may be entitled to recover possession of the remaining 66 cents. For this purpose the plffs are directed to file a separate suit if they are so advised to recover possession of that property after demarcating the same if the deft is in possession of that portion also....."

9. Challenging that decree and judgment the plaintiffs filed S.A.No.69/1972 before this Court. Before this Court also the plaintiffs reiterated the argument that the property covered under Exts.P3 and P4 was only one acre and excluding that one acre the first defendant had no title for the remaining 66 cents inclusive of 14 cents by virtue of Ext.P6 and 52 cents by virtue of Ext.P5.

They prayed for recovery of that 66 cents without they being driven to a fresh suit. After noting the operative portion of the judgment of the lower appellate court which I have already extracted, this Court took a view that the suit started in the year 1962 and it was a fight between very close relations and instead of driving them to a fresh round of litigation appropriate reliefs can be granted in the suit itself. For that purpose this Court remanded the suit. The operative portion of the judgment reads as follows:

> "The trial court will issue a commission on the application of the plaintiffs to demarcate the 66 cents (including the 14 cents covered by Ext.P6) which is claimed by the first plaintiff. In demarcating that area the court will also get the two buildings items 3 and 4 located, in order to find out whether any or either of them stands in the 14 cents or in any other portion of the 66 cents. If the buildings or building stands in this area and the court finds that the plaintiffs are entitled to recover the land where the building or buildings stand, it will pass appropriate directions, either asking the plaintiffs to pay compensation to the defendant or allowing the defendant to remove the building or buildings. The court will also determine the extent of the land which the defendant obtained under Exts.P3 and P4 --whether it was 1 acre or anything more. It would also deal with the defendant's defence, if any, to the recovery by the plaintiffs of 52 cents exclusive of the 14 cents covered by Ext.P6."

So this Court issued a specific direction to demarcate 66 cents inclusive of 14 cents covered by Ext.P6. This Court also held that while adjudicating the respective rights of parties, the court will also decide the loss sustained by either or

both parties on account of the road and in case court finds that the plaintiffs are entitled to recover the land where the building or buildings stand, it will pass appropriate orders. This Court further found that the defendant's defence, if any, to the recovery by the plaintiffs of 52 cents exclusive of the 14 cents covered by Ext.P6 should be considered by the trial court. This judgment has become final and conclusive and parties are bound by the judgment. The conclusion is inescapable. The defendants cannot resist recovery of 14 cents covered by Ext.P6 if they are found to be in possession. Regarding the 52 cents of land the direction was that the trial court "would deal with the defence if any to the recovery by the plaintiffs".

10. After remand a Commissioner was deputed who filed Ext.C1 report and Ext.C2 plan. A reading of the judgment of the trial court shows that it had proceeded on the assumption that the only issue arose for consideration was location of the property to be recovered. Trial court took a view that the remand order allows the plaintiffs to recover the surplus area and a decree is to be granted for the surplus area. Trial court found that the plotting of Exts.P3 and P6 is wrong but otherwise the plan is correct. Trial court accepted the plan for the sake of recovery alone. It was further held that area covered under Ext.P6 is to be found in some other place but it shall be within KLHE plot and therefore the Commissioner's finding regarding the location of Ext.P6 property was cancelled.

Trial court further found that though the plaintiff was allowed to recover 66 cents, the plot demarcated by the Commissioner was having an area of 95.95 cents. The plaintiffs were granted a decree of recovery of BCHG plot, a plot lying on the eastern side of the road. Both sides filed appeals. Plaintiffs filed A.S.No.106/1978 and additional defendants filed A.S.No.110/1978. Lower appellate court found that the trial court without identifying Ext.P6 property had decreed the suit and that was against the direction issued by this Court in the Second Appeal. It was also found that the area allowed to be recovered is much more than what was claimed by the plaintiffs and therefore the contention that identification has been made in respect of the plan submitted by the Commissioner cannot be accepted. It was held that the plan and report submitted by the Commissioner have to be remitted back to him for correctly locating and demarcating the 66 cents including the 14 cents covered by Ext.P6 which was claimed by the first plaintiff. The lower appellate court set aside the decree and judgment and remanded the suit with a direction to remit the report and plan back to the Commissioner to demarcate 66 cents. Plaintiffs filed C.M.A.No.52/1982 challenging that order of remand before this Court. This Court after taking note of the operative portion of the judgment in Second Appeal took a view that it was a case which requires no further evidence. It was held that the appellate court itself can consider the matter on existing evidence. The operative portion of the

judgment in C.M.A.No.52/1982 reads as follows:

> "This is a matter which requires no further evidence. The appellate court can on the basis of the existing evidence and pleadings consider whether the property has been correctly identified as the property claimed by the plaintiffs and if so whether the identified area is 66 cents in extent or more. If it is more, it has to be reduced to the size claimed by the plaintiffs. If it is less, it has to be considered whether the plaintiffs are entitled to have the deficiency made good. Although I have stated that these are matters which require to be considered on the basis of the existing evidence and pleadings, the appellate court is not precluded, if so advised, in appointing a commission for physical identification of the property. The court shall dispose of the appeal on the merits."

The lower appellate court while remanding the case directed the trial court to remit the report back to the Commissioner to locate and demarcate 66 cents. The only point considered by this Court in C.M.A.No.52/1982 was whether that direction was correct. This Court held that the question is whether the trial court had correctly demarcated the property as directed by this Court and whether the area demarcated exceeded the limit claimed by the plaintiffs. This Court held that this matter requires no further evidence and directed the appellate court to dispose of the appeal with the evidence on record. After remand the defendants filed I.A.No.1746/1980 before the lower appellate court for amending the written statement. That application was dismissed. In C.R.P.No.939/1982 though the dismissal was confirmed it was held that the amendment sought was as to whether

Article 142 of the old Limitation Act would apply or not, which is a pure question of law which can still be argued before the lower appellate court. So a reading of the Second Appeal judgment, remand order and order in Civil Revision Petition makes it clear that the case was remanded not for recovering the surplus area but to locate 14 cents covered by Ext.P6 and excess land of 52 cents claimed by the plaintiffs and then to consider the defence of defendants if any to the recovery of 52 cents by the plaintiff. A reading of the judgment passed by the trial court after remand shows that it had not considered that issue at all. A reading of the judgment further shows that the lower appellate court had also not considered the matter in accordance with the directions issued by this Court in Second Appeal and in C.R.P. The trial court itself had found that the identification of 14 cents was not correct. A reading of Exts.P3 and P4 shows that 14 cents area is on the western side and it lies on north-south. The lower appellate court did not consider whether the defendants are entitled to raise any contention regarding the right of the plaintiffs to recover the property in spite of the specific direction in Second Appeal that the defence of defendants, if any, in respect of 52 cents is to be considered and also the direction in the C.R.P. that the contention regarding limitation being a question of law can be raised at any stage.

11. Ext.P5 sale deed is for two acres of land. First plaintiff had claimed right over that property. In the plaint itself he had admitted that 34 cents were

surrendered for the road and the extent of suit properties was only one acre and 66 cents. So the 34 cents of land which the plaintiffs had surrendered was not a subject matter of the suit at all. So the question whether the entire 34 cents was surrendered or not and any portion of that 34 cents can be ordered to be recovered cannot be considered in this case. The entire extent of 34 cents surrendered is to be located and excluded and the remaining one acre and 66 cents alone is to be taken as the suit property. No relief in respect of any property which is not a subject matter of the suit can be granted in this suit. So the proper course is that after locating the property with the help of Exts.P1 to P7 34 cents which the first plaintiff had surrendered for road is to be excluded. Thereafter one acre and 66 cents of land is to be located. In that plot the properties covered under Exts.P3, P4 and P6 are to be located. After locating 14 cents the court shall consider the defence of defendants if any regarding 52 cents. The total area of the property covered by the sale deed in favour of the plaintiffs is only two acres. It was found that the first defendant is having fixity of tenure for one acre. The lower appellate court has now passed a decree allowing the plaintiffs to recover an area of one acre and 10 cents of land. The subject matter of the suit is only one acre and 66 cents. The court below has not considered as to how it can allow recovery of one acre and 10 cents of land from one acre and 66 cents after excluding one acre. So the decrees and judgments passed by the trial court and first appellate court

cannot be allowed to stand and they are liable to be set aside and matter is to be remanded to the trial court for fresh consideration. Trial court shall depute a Commissioner to locate the suit property of one acre and 66 cents. 34 cents surrendered for the formation of the road is to be excluded and no relief in respect of any portion of that 34 cents shall be granted in the present suit. After locating one acre and 66 cents court below shall consider and dispose of the case in accordance with the directions issued by this Court in Second Appeal, C.M.A. and C.R.P.

L.A.A.No.240/1990

12. Land Acquisition Appeal was decided solely based on the decision in A.S.No.106. Today I have set aside that judgment and remanded the case for fresh disposal. So the judgment and decree passed by the Land Acquisition Court in L.A.R.No.124/1985 are also set aside. L.A.A is remanded for fresh disposal after affording an opportunity to the parties to adduce evidence.

In the result, Second Appeal and Land Acquisition Appeal are disposed of as above.

K. PADMANABHAN NAIR,
JUDGE.

Appeals are posted for 'to be spoken to' today. While remanding the

matter this Court failed to fix the date for appearance of parties. Parties shall appear before the lower court on 26.11.2007.

16th October, 2007.

K.PADMANABHAN NAIR,
JUDGE

K.PADMANABHAN NAIR, J.

L.A.A.No.240 of 1990
&
S.A.NO.422 of 1998

JUDGMENT

20th September, 2007.